

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARIA GOMEZ,

Defendant.

Case No. 3:11-cr-0100-LRH-VPC

ORDER

Before the court is defendant Maria Gomez's ("Gomez") motion to vacate, set aside, or correct her sentence pursuant to 28 U.S.C. § 2255. ECF No. 40. The United States filed an opposition to the motion. ECF No. 43.

**I. Facts and Procedural Background**

On August 24, 2011, Gomez was indicted on two charges: (1) conspiracy to possess with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 846 & 841(a)(1) and (b)(1)(A); and (2) possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). ECF No. 11. On January 10, 2012, Gomez pled guilty to count one of the indictment for conspiracy to possess with intent to distribute methamphetamine. ECF No. 19. She was subsequently sentenced to ninety-six (96) months incarceration. ECF No. 32. Gomez did not appeal her sentence to the Ninth Circuit Court of Appeals. On May 11, 2015, the court reduced Gomez's sentence to eighty-seven (87) months incarceration

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1 based on a guideline sentencing range that was subsequently lowered and made retroactive by  
2 the United States Sentencing Commission (“USSC”). ECF No. 38.

3 Subsequently, on August 4, 2016, Gomez filed the present motion to vacate, set aside, or  
4 correct her sentence pursuant to 28 U.S.C. § 2255. ECF No. 40.

## 5 **II. Motion to Vacate Sentence**

6 Pursuant to 28 U.S.C. §2255, a prisoner may move the court to vacate, set aside, or  
7 correct a sentence if “the sentence was imposed in violation of the Constitution or laws of the  
8 United States, or that the court was without jurisdiction to impose such sentence, or that the  
9 sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral  
10 attack.” 28 U.S.C. § 2255; 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice*  
11 and Procedure § 41.3b (5th ed. 2005).

12 In her motion to vacate, Gomez argues that the court should grant her motion because she  
13 was a minor participant in the conspiracy, and thus, is entitled to a minor participant reduction  
14 under Amendment 794 to the Sentencing Guidelines. *See* ECF No. 40. The court disagrees.

15 In November 2015, the United States Sentencing Commission modified the commentary  
16 to sentencing guideline § 3B1.2 through Amendment 794. *See* U.S.S.G. App. C, Amend. 794.  
17 Through that amendment, a criminal defendant may receive a reduction to his or her guideline  
18 calculation, and thus to the applicable guideline sentencing range, if that defendant was a  
19 minimal participant in a criminal conspiracy. Such a reduction is made at the time of sentencing  
20 and is solely within the discretion of the sentencing court.

21 In her motion, Gomez contends that she was a minimal participant in the underlying  
22 criminal conspiracy, and as such, would have been entitled to receive a reduction to her guideline  
23 calculation range had Amendment 794 been in effect at the time of her sentencing. *See*  
24 ECF No. 40. However, Amendment 794 was not made retroactive by the USSC in cases, like  
25 Gomez’s, on collateral review. *See, e.g.,* *United States v. Burlingame*, 2016 U.S. Dist. LEXIS  
26 158288, \*5 (E.D. Mich. 2016) (holding that Amendment 794 has not been held to be retroactive  
27 on collateral appeal); *Aguas-Landaverde v. United States*, 2016 U.S. Dist. LEXIS 13-525, \*2  
28 (S.D. Ohio 2016); *United States v. Tapia*, 2016 U.S. Dist. LEXIS 123706, \*1 (M.D. Fla. 2016).

1 Accordingly, the court shall deny her motion to vacate, set aside, or correct her sentence pursuant  
2 to 28 U.S.C. § 2255.

3 **III. Certificate of Appealability**

4 Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), "an appeal  
5 may not be taken to the court of appeals from . . . the final order in a proceeding under section  
6 2255" unless a district court issues a certificate of appealability ("COA") based on "a substantial  
7 showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(1)(B).


8 Here, the court finds that Gomez has not shown a denial of a constitutional right in her  
9 motion. In denying his motion, the court notes that Gomez has failed to raise a meritorious  
10 challenge to her sentence based upon the subsequent sentencing guideline amendment,  
11 Amendment 794. *Supra*, Section II. As such, the court finds that Gomez has failed to  
12 demonstrate that reasonable jurists would find the court's assessment of her claims debatable or  
13 wrong. *See Allen v. Ornoski*, 435 F.3d 946, 950-951 (9th Cir. 2006). Therefore, the court shall  
14 deny Gomez a certificate of appealability as to her motion to vacate sentence.

15  
16 IT IS THEREFORE ORDERED that defendant's motion to vacate, set aside, or correct  
17 her sentence pursuant to 28 U.S.C. § 2255 (ECF No. 40) is DENIED.

18 IT IS FURTHER ORDERED that defendant is DENIED a certificate of appealability.

19 IT IS SO ORDERED.

20 DATED this 20th day of March, 2017.

21   
22 LARRY R. HICKS  
23 UNITED STATES DISTRICT JUDGE  
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